UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CAROL J. WINTHAL, MARTIN J. WINTHAL, Appellants, vs. MANLEY BOWLER, Appellee.	)	No. 22808

APPELLEE'S BRIEF

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JURISDICTION

The jurisdiction of the United States District Court for the Northern District of California to entertain appellants' complaint was conferred by Title 42, United States Code sections 1981 et seq., and Title 28, United States Code section 1343. The jurisdiction of this Court is conferred by Title 28, United States Code section 1291.

STATEMENT OF THE CASE

This is an appeal from the February 28, 1968 order of the District Court which (1) denied Martin Winthal's motion to enjoin the California Adult Authority from taking further actions with regard to him and (2) dismissed the action as to the defendant Manley Bowler, a member of the California Adult Authority. Appellants' first papers in this case were filed May 9, 1967 and

dismissed October 6, 1967 by the District Court under Rule 8a, Federal Rules of Civil Procedure, with leave to file an amended complaint.

Early in December, 1967, appellants filed an amended complaint and an application for an injunction against the California Adult Authority. On December 13, 1967 the District Court issued an order to the defendants to show cause on January 19, 1968 why a permanent injunction should not issue. On January 11, 1968 the defendants Bowler and the California Adult Authority filed a return to the order to show cause and on January 18, 1968 plaintiffs filed a traverse. The matter was argued and submitted January 19, 1968.

On February 8, 1968 Manley Bowler noticed a motion to dismiss the action as to himself which was argued and submitted.

On February 28, 1968 the District Court denied the injunction against the California Adult Authority and discharged its order to show cause and also granted Bowler's motion to dismiss the action. This is the order appealed from.

STATEMENT OF FACTS

Preliminary Statement

It would appear unnecessary for appellee to set forth a statement of facts since appellants have declined to do so in the Opening Brief. These circumstances ordinarily would call for a motion before this Court to strike Appellants' Opening Brief by reason of its failure to have complied with Rule 28, Federal Rules of Appellate Procedure. Experience teaches,

however, that little would be accomplished by such a motion in view of appellants' having consistently filed papers, both in the District Court and in this Court, which are virtually incomprehensible.[1/]

Accordingly, we set forth here no detailed statement of facts because the issues and discussion set forth in Appellants' Opening Brief do not require it. Each of the matters raised in the Opening Brief have been well settled by the opinions of this Court contrary to appellants' position. We also point out here that, of course, this brief is not addressed to the following points in Appellants' Opening Brief which relate exclusively to the federal defendants:

A. Under "Questions Involved" we do not address ourselves to paragraph numbered four (Appellants' Opening Brief, p. 3).

B. Under "Specifications of Error" we do not address ourselves to paragraph numbered three (Appellants' Opening Brief, p. 4).

C. Under "Argument" we do not address ourselves to paragraph numbered six (Appellants' Opening Brief,

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1. Our Return to the Order to Show Cause and Points and Authorities in Opposition to the Petition for Permanent Injunction, filed in the District Court July 11, 1968, sets forth our understanding and our detailed response to appellants' application for the injunction. Similarly, our Points and Authorities in Support of the Motion to Dismiss as to Manley Bowler contains our understanding of the amended Complaint and our detailed response to it. In view of the nature of Appellants' Opening Brief, however, we decline to go into this material, the discussion of which would be mainly repetitive of the above documents which are already part of the record on appeal.

pp. 7 and 8).

ISSUES PRESENTED FOR REVIEW

1. Whether the federal District Court may enjoin the California Adult Authority from enforcing California's Indeterminate Sentence Law under the authority delegated it by the Legislature.

2. Whether the members of the California Adult Authority are individually liable under the Civil Rights Act for acts done in their official capacity.

3. Whether California's Indeterminate Sentence Law is unconstitutional.

ARGUMENT

I

APPELLANTS HAVE NEVER STATED JUSTIFICATION FOR ENJOINING THE ADULT AUTHORITY FROM ENFORCING CALIFORNIA'S INDETERMINATE SENTENCE LAW IN EXERCISE OF THE AUTHORITY DELEGATED IT BY THE LEGISLATURE.

The first and third issues as set forth above are inextricably bound together. California's Indeterminate Sentence Law is indisputably valid under the United States Constitution as is the delegation of power to fix and refix terms and grant and revoke parole. Dreyer v. Illinois, 187 U.S. 71, 83, 84 (1902); Bennett v. California, ___ F.2d ___ (9th Cir. 1969) (No. 21,952, decided January 9, 1969, and the cases there cited). Accordingly, such conduct of the California Adult Authority may not be enjoined for the simple reason it is not invalid under federal law.

Where a state prisoner attacks the revocation of his

parole on federal constitutional grounds, a remedy must be sought by way of a petition for writ of habeas corpus. Cf. Dunn v. California Department of Corrections, 401 F.2d 340, 342 (9th Cir. 1968). Neither this Court nor the District Court may grant him relief in this action because to do so would be to treat the instant action as one for a writ of habeas corpus; such writ could not properly issue because Martin Winthal's custodian is not a party to the action. See Gaito v. Strauss, 368 F.2d 787, 788 (3rd Cir. 1966), cert. denied, 386 U.S. 977 (1967). This Court has held that an action under the Civil Rights statutes may not be used as a substitute for habeas corpus. DeWitt v. Pail, 366 F.2d 682 (9th Cir. 1966). This is particularly true where to use a civil rights action as a substitute for habeas corpus would operate to allow the plaintiff to avoid the exhaustion of state remedies requirements of Title 28, United States Code section 2254. Johnson v. Walker, 317 F.2d 418, 419-20 (5th Cir. 1963); Davis v. Maryland, 248 F.Supp. 951, 952-53 (W.Dis. Md. 1965). Such a remedy is presently available upon proper grounds under California state law which provides a means to determine whether parole has been improperly revoked. See, e.g., In re Hall, 63 Cal.2d 115 (1965).[2/]

Appellants also failed to set forth any justification

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2. It should be noted here that in Civil Action No. 45793 in the files of the United States District Court for the Northern District of California, Martin Winthal unsuccessfully petitioned for a writ of habeas corpus on the grounds that his state court convictions are invalid. This petition was dismissed by order of the court signed November 9, 1966 by Chief Justice Harris on the ground that Winthal had failed to comply with Title 28, United States Code section 2254.

for enjoining the California Adult Authority from acting in Martin Winthal's case on the grounds that he need not be permitted counsel at a parole revocation hearing, and indeed need not be given the opportunity to appear at all. The rights granted a criminal defendant at a probation hearing under Mempa v. Rhay, 389 U.S. 128 (1967), are inapplicable to state parole revocation hearings. This point has been expressly decided by this Court in Dunn v. California Department of Corrections, 401 F.2d 340, 342 (9th Cir. 1968) and in Eason v. Dickson, 390 F.2d 585, 588-89 (9th Cir. 1968).

II

THE MEMBERS OF THE CALIFORNIA ADULT AUTHORITY ARE NOT SUBJECT TO A SUIT FOR DAMAGES UNDER THE FEDERAL CIVIL RIGHTS ACT FOR ACTS DONE IN THEIR OFFICIAL CAPACITY.

It is well settled that state agencies such as the California Adult Authority are not "persons" within the meaning of the Civil Rights Act. Bennett v. California, supra; Clark v. Washington, 366 F.2d 681 (9th Cir. 1966); Sires v. Cole, 320 F.2d 877, 879 (9th Cir. 1963). The actions of Manley Bowler of which Martin Winthal complains fall within the quasi-judicial or discretionary duties and functions vested in him by state law and are alleged to have been taken in his official capacity. As to such actions, it is well settled by the decisions of this Court that the members of the Adult Authority are immune from suit for damages under the Civil Rights Act. Bennett v. California, supra; Silver v. Dickson, ___ F.2d ___ (9th Cir. 1968) (No. 22129, decided November 8, 1968).

CONCLUSION

For the aforementioned reasons the order of the District Court, dated February 28, 1968, denying appellant's motion for a permanent injunction against the California Adult Authority and dismissing the action as to the defendant Manley Bowler should be affirmed.

Dated: March 26, 1969

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